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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-1481

CHARLES EDWARD COX,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

Petitioner, Charles Edward Cox, prays that a Writ of Certiorari issue to review the judgment of the Tennessee Court of Appeals entered in this cause on November 28, 1972.

OPINION BELOW

A copy of the opinion of the Court of Criminal Appeals of Tennessee is appended (Appendix A, p. 26). No opinion was rendered by the Tennessee Supreme Court but a copy

of the Order denying petitioner's Writ of Certiorari is attached (Appendix B, p. 32).

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on February 5, 1973 (Appendix B, p. 32). The jurisdiction of this Court rests upon 28 U.S.C.A. 1257(3) to review the final decision of the highest court of the State of Tennessee.

QUESTIONS PRESENTED FOR REVIEW

The sole question presented by this appeal is whether the Trial Court erred and abused its discretion in refusing to grant a continuance because of the absence of a material witness who was imprisoned in the Federal Penitentiary at Leavenworth, Kansas in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 8 and Article I, Section 9 of the Tennessee Constitution which deprived the petitioner of a fair trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment, United States Constitution.

2. The Fourteenth Amendment, United States Constitution.

Amendment 6:

Rights of the accused.— In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which

district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment 14:

Citizenship — Due process of law — Equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

This case also involves Article I, Section 8 and Article I, Section 9 of the Tennessee Constitution.

Section 8:

No man to be disturbed but by law. — That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Section 9:

Right of the accused in criminal prosecutions. — That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face,

to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

This case also involves *Tennessee Code Annotated*, § 40-2405 and § 40-2428.

Section 40-2405:

Meeting witnesses face to face — Compulsory process for defense. — By the Constitution, the accused, in all criminal prosecutions, has a right to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

Section 40-2428:

Depositions. — The accused may, by order of the court, have the depositions of witnesses taken in the manner prescribed for taking depositions in civil cases, on notice to the district attorney.

STATEMENT OF FACTS

The petitioner was convicted of the offense of Armed Robbery of the By-Ryt Supermarket in Chattanooga, Tennessee, and sentenced to ten (10) years in the state penitentiary by a jury in Chattanooga on December 2, 1971. On June 30, 1971, petitioner was indicted by the Hamilton County Grand Jury (Appendix C, p. 33). On July 6, 1971, the Court set the case for trial on September 28, 1971. On September 28, 1971, counsel for petitioner filed a motion with accompanying affidavit requesting the state attorney general to file a writ of habeas corpus Ad Testificandum

to secure the presence of petitioner's brother, Melvin Luther Cox, who was incarcerated in a federal penitentiary after having been a fugitive from justice (Appendix D, p. 36). Said case was passed to December 2, 1971 and on December 1, 1971, counsel for petitioner filed a Motion to Continue and Motion to Take Deposition with accompanying affidavit (Appendix E, p. 38). In said affidavit, petitioner's counsel, Carter Schoolfield, stated that if petitioner's brother had been available to be called to testify that he would have testified that he committed said offense and not the petitioner. That because of the high cost of Two Thousand ($2,000.00) Dollars required to secure the presence of the witness the petitioner would be unable to pay said amount but felt that the family of the petitioner could obtain the necessary funds to take his brother's deposition. Said affidavit further claimed that the testimony of said Melvin Luther Cox was vital to the defense and that the petitioner would not receive a fair and impartial trial without the testimony of said witness.

On the date of the trial, the Trial Judge heard argument on the motions. Petitioner's counsel contended that the reason that no attempt had been made to obtain the presence of petitioner's brother was because the said Melvin Luther Cox had been a fugitive from justice prior to the filing of the Motion for Order Requiring State to File Habeas Corpus Ad Testificandum (Appendix F, p. 41). The State objected to the continuance and made no offer to stipulate that what petitioner's counsel alleged in his affidavit would have been the testimony of the missing witness, Melvin Luther Cox. The Trial Court overruled the motions and petitioner was tried and convicted on December 2, 1971 (Appendix G, p. 49).

Petitioner's defense throughout said trial was that his brother, Melvin Luther Cox, committed the robbery with

co-defendant, Jessie Jones, and that he had nothing to do with it and that his brother, Melvin Cox, would so have testified.

The State introduced three witnesses who testified that the petitioner was one of the two men who held up the business involved. Mr. Elwood Slayton identified petitioner as one of the holdup men and testified that when he was held up the defendant had a flattop or crew cut style of haircut (Appendix H, p. 50). Coy Parker also testified for the State and identified the defendant and stated that the robber had a sort of flattop haircut (Appendix I, p. 51).

The petitioner, Charles Edward Cox, testified in his own behalf and denied any involvement in the offense charged against him. He testified that his brother, Melvin Cox, always wore a short haircut and that he always wore his hair long (Appendix J, p. 58). He further testified that he had been accused of other offenses that his brother was subsequently found guilty of with the co-defendant Jessie Jones, including robbery and murder (Appendix K, p. 59). He further testified that he was at his mother's house on the date of the robbery at the By-Ryt and that his brother and another individual borrowed her car (Appendix L, p. 57, 61).

The petitioner's mother, Dorothy Cox, testified that she loaned her car to her son, Melvin Cox, the date of the holdup (Appendix M, p. 66). She further testified that Melvin Cox and Jessie Jones had been tried for several crimes that they committed together prior to May of 1970, including robbery and murder and that petitioner's picture was on the news and in the newspapers as being the person who committed the offense with Jessie Jones (Appendix N, p. 69).

Petitioner's brother, Clyde Cox, testified that petitioner never wore his hair in a flattop and that Melvin Cox always

wore his hair in a crew cut (Appendix O, p. 70). Following his conviction, petitioner assigned as error the Trial Court's denial of his Motion to Continue in his Motion for New Trial (Appendix P, p. 75), which was overruled by the Trial Judge on January 24, 1972 (Appendix Q, p. 76).

Petitioner appealed his conviction to the Court of Criminal Appeals of Tennessee which denied his appeal on November 28, 1972 (Appendix A, p. 26). On February 5, 1973, petitioner was denied a writ of certiorari by the Tennessee Supreme Court (Appendix B, p. 32). On March 1, 1973, petitioner was granted ninety (90) days in which to file a Petition for Writ of Certiorari to this Court (Appendix R, p. 77).

ARGUMENTS AND AUTHORITIES

THE SOLE QUESTION PRESENTED BY THIS APPEAL IS WHETHER THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN REFUSING TO GRANT A CONTINUANCE BECAUSE OF THE ABSENCE OF A MATERIAL WITNESS WHO WAS IMPRISONED IN THE FEDERAL PENITENTIARY AT LEAVENWORTH, KANSAS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 8 AND 9 OF THE TENNESSEE CONSTITUTION WHICH DEPRIVED THE PETITIONER OF A FAIR TRIAL.

The accused in a criminal proceeding has a constitutional right to assert his innocence and to show that it was not he but another person who committed the crime. He is entitled to compel the attendance at trial of witnesses who could absolve him of the crime. *Washington v. Texas*, 388 U.S. 14 (1967).

The Constitution guarantees the accused more than the mere disclosure and attendance of exculpatory witnesses. It entitles him to offer their testimony on his behalf. To that extent the Due Process Clause of the Fourteenth Amendment and the Compulsory Process Clause of the Sixth Amendment serve as constitutional rules of evidence. They render admissible on behalf of the accused the material testimony of witnesses in his favor.

I.

The Due Process Clause Protects Petitioner's Right to Present Exculpatory Witnesses:

Amendment 14:

Citizenship — Due process of law — Equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Tennessee Constitution
Article I, Section 8

No man to be distrubed but by law. — That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

The Due Process Clause of the Fourteenth Amendment and Article I, Section 8 of the Tennessee Constitution guarantees the accused a fair trial. It gives him the right to put on evidence in his favor and to offer third party confessions to exculpate himself. It forbids the state from acting even in good faith, to deny him an opportunity to defend himself.

Mr. Justice Powell, in one of the latest decisions on Due Process, decided by the United States Supreme Court in *Chambers v. Mississippi*, 71-5908, decided February 21, 1973, said:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Due Process entitles the accused to put on affirmative defense. *Specht v. Patterson*, 386 U.S. 605. *Ferguson v. State*, 365 U.S. 570. It gives him the right to "present evidence" on his behalf, and to "offer testimony" by witnesses in his favor. Mr. Justice Black writing for the Court in *In re Oliver*, 333 U.S. 257, (19) identified these rights as among the minimum essentials of a fair trial:

> A person's right to reasonable notice of the charge against him, and an opportunity to be heard in his defense—A right to his day in court—are basic in our system of jurisprudence; and these rights includes, as a minimum, a right to examine the witnesses against him *to offer testimony*, and to be represented by counsel. (Emphasis added.)

See also *Morrissey v. Brewer*, 408 U.S. 411, 92 S. Ct. 2593.

In *Jenkins v. McKeithen*, 395 U.S. 411 (1960) the Court held:

> The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. And, as we have noted above, this right becomes particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime.

In the principal case petitioner was denied the right to offer the testimony of a witness whose testimony was vital to his defense of mistaken identity. The Trial Court's overruling of petitioner's Motion to Continue and Motion to Take Deposition prevented petitioner from putting on a defense and, thereby, violated the principles of *Brady v. Maryland*, 373 U.S. 8, ... S. Ct. ... (1963).

In *Brady*, the defendant was found guilty of a murder to which someone else had confessed. The state denied him the benefit of the third person confession by concealing its existence. The Court reversed, holding that the state denied the petitioner Due Process when it suppressed a confession that was material to his defense:

> We hold now that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87.

Brady concluded that the accused has a constitutional right to know of an exculpatory confession in his favor. In the principal case Tennessee has denied petitioner of the benefit of a vital confession by his brother, Melvin

Luther Cox, not by concealing it from him, but by preventing the introduction of his testimony.

The effect on the accused is the same whether the state suppresses exculpatory evidence or prevents its introduction on his behalf. In each case, the state denies the petitioner the right to be judged by all available evidence.

A state cannot deny with one hand what Due Process forces it to disclose with the other. If it has any meaning, *Brady* gives the accused not only access to exculpatory testimony but an opportunity to offer it on his behalf.

In the principal case petitioner's main defenses were an "alibi" and "mistaken identity" by the prosecution witnesses. It was his contention that his brother, Melvin Luther Cox, had committed the crime for which he was charged, and would have confessed to this effect if he had been allowed to testify, in person or by deposition. Petitioner based his own innocence on the evidence of his brother's guilt. Petitioner's counsel, as an officer of the Court, represented in his affidavit and in his argument of his Motion to Continue and Motion to Take Deposition that petitioner's brother was a vital and material defense witness (Appendix E, p. 38). The state objected to a continuance and made no attempt or offer to stipulate petitioner's contentions as to Melvin Luther Cox's testimony in person or by deposition. By denying petitioner a continuance the trial court violated Due Process by preventing the taking of his deposition or producing him to testify.

II.

The Compulsory Process Clause Protects Petitioner's Right to Present Exculpatory Witnesses.

The Fourteenth Amendment gives additional protection to exculpatory testimony through its incorporation of the Compulsory Process Clause. *Duncan v. Louisiana*, 391 U.S. 145, ... S. Ct. ... (1968). The Compulsory Process Clause of the Sixth Amendment gives the accused the right to obtain "witnesses in his favor".

> In all criminal prosecutions, the accused shall enjoy the right .... to have compulsory process for obtaining witnesses in his favor ...." U.S. Constitution Amend. VI.

In Tennessee an accused is granted the same privilege by Article I, Section 9:

> *Right of the accused in criminal prosecutions.*— That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

Also involved with this privilege is Tennessee Code Annotated, Section 40-2405:

> *Meeting witnesses face to face—Compulsory process for defense*— By the Constitution, the accused, in all criminal prosecutions, has a right to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

The right of the accused to obtain witnesses in his favor includes more than the presence of his witnesses at trial.

It entitled him to offer their testimony to the jury. The Court summed it up in *Washington v. Texas*, 388 U.S. 14, ... S. Ct. ... (1967).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms, the right to present defense, the right to present the defendant's version of the facts ... to the jury so it may decide where the truth lies.

The petitioner in *Washington* was found guilty and sentenced to life imprisonment on a charge of murder. He claimed he was innocent and accused a co-defendant of committing the crime. When he offered the co-defendant's confession, however, a Texas witness rule prevented the co-defendant from testifying on his behalf. The Supreme Court unanimously reversed. It declared the Texas rule unconstitutional because it prevented the accused from offering the confession to exculpate himself.

The principles of *Washington* control the present case. Texas used a witness rule to exclude the co-defendant's testimony. The Trial Judge in the principal case used a discretionary rule of judicial action to bar the exculpatory testimony of petitioner's brother, Melvin Luther Cox. Both rules had the same effect. In each case, they denied the accused the benefit of material testimony that someone else committed the crime.

The decision in *Washington* did not rest on the difference between witness rules and evidence rules. The result surely would have been the same if Texas had used a rule of evidence to exclude the co-defendant's testimony. The Compulsory Process Clause invalidates witness rules and rules of evidence alike whenever they render the exculpatory testimony of defense witnesses inadmissible:

> The Sixth Amendment was designed to make the testimony of a defendant's witnesses admissible on his behalf in court.... 388 U.S. at 22.

The principal case and *Washington* both involve the third party confessions. The co-defendant in *Washington* was ready to exonerate the accused by reciting his own confession. Petitioner's counsel, Carter Schoolfield, as an officer of the Court, represented in his affidavit and argument in support of his motions that Melvin Luther Cox was ready to exculpate petitioner by his testimony.

The decision in *Washington* did not rest on the identity of the witness. The right of an accused to call witnesses does not depend on whether they recite their own confessions or the confessions of another. It depends on the importance of their testimony to his defense. The accused has a right to put his witnesses on the stand whenever their testimony is "relevant and material to the defense". 388 U.S. at 23.

In *Chambers v. Mississippi*, *supra*, Mr. Justice Powell further said:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. E.g. *Webb v. Texas*, ... 409 U.S. ... (1972); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *In re Oliver*, *supra*. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long ex-

> isted. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.
>
> We conclude that the exclusion of this critical evidence coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process.

The doctrines expressed in these decisions show that under the facts and circumstances of the principal case the rulings of the Trial Court deprived petitioner of a fair trial.

III.

Tennessee Constitution case law and statute provides for continuances due to unavailability of witnesses in accordance with Compulsory Process Clause, Article I, Section 9:

> *Right of the accused in criminal prosecutions.* — That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

Tennessee Code Annotated, § 40-2405:

> *Meeting witnesses face to face—Compulsory process for defense.*— By the Constitution, the accused, in all criminal prosecutions, has a right to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

As stated in the opinion of the Court of Criminal Appeals of Tennessee in the principal case:

> It is settled law that a motion for a continuance is addressed to the sound judicial discretion of the trial judge, and that his judgment will not be disturbed in the absence of a clear showing, by something developed in the trial, that he abused his discretion to the prejudice of the accused. *State ex rel Carroll v. Henderson*, 1 Tenn. Crim. App. 427, 434, 443 S.W.2d 689; *Oden v. State*, 2 Tenn. Crim. App. 304, 453 S.W.2d 441; *Moorehead v. State*, 219 Tenn. 271, 409 S.W.2d 357.

Before entering into a discussion of the case law of the State of Tennessee several aspects of the principal case should be noted as being evident from an examination of the trial transcript:

(1) Petitioner's defense was that the prosecution witnesses had mistaken him for his brother, Melvin Luther Cox.

(2) Petitioner's counsel had taken all available steps to secure Melvin Luther Cox's presence by attempting to secure his presence and trying to take his deposition.

(3) Melvin Luther Cox had been unavailable as a witness prior to filing of Writ of Habeas Corpus Ad Testificandum because he had been a fugitive from justice.

(4) Melvin Luther Cox was a material and essential witness to petitioner's defense of mistaken identity.

(5) Melvin Luther Cox and co-defendant, Jessie Jones, had been convicted of several crimes together and petitioner had previously been falsely accused of some of those offenses and exonerated.

(6) The prosecution opposed said continuance and did not agree to stipulate as to petitioner's contentions of what would have been his brother's testimony.

Where a continuance is sought on the ground of the absence of a material witness, the movant is normally required to accompany his motion by an affidavit setting forth the matter to which the absent witness would testify, and to make a showing of the relevancy, competency, and credibility of the testimony in question. See 17 Am. Jur. 2d, Continuance 7, 8. The courts in criminal cases have frequently recognized and approved the practice of allowing the opposing party to avoid a continuance sought on such a showing by making a formal admission that the absent witness, if present, would testify as set forth in the movant's affidavit.

Several old Tennessee cases discuss the legal principle involved in petitioner's case. In *Rhea v. State*, 18 Tenn. 257 (1837) the defendant moved for a continuance on the ground that two witnesses that he intended to call as character witnesses were unavailable because of illness and attached his affidavit to his motion stating these facts. Upon the affidavit being presented, the attorney general proposed to admit that the witnesses named in said affidavit, if present, would swear to the good character of the defendant. The Court overruled the motion and said:

> We arrive at this conclusion, not by force of the reason which probably impelled the court below—the admission of the attorney general—for that admission, going not to the truth of the fact, but being only that the witnesses, if present, would swear as stated, might have been in its practical operation, as has been argued, altogether illusion...
>
> As to the general allegation of the defendant in his affidavit, that by the witnesses named he could prove other facts of vital importance to his defense, it could not entitle him to a continuance. When a party shows cause by affidavit, he must state facts in order that the court may determine their importance; his opinion of the importance of undisclosed facts can constitute no safe or proper ground for the action of the court.

In those jurisdictions where, for constitutional or other reasons, it is held that an otherwise proper continuance claimed because of the absence of witnesses cannot be denied unless the opponent admits the truth of the alleged testimony as well as that the absent witness would give such testimony if present, it has frequently been recognized that if the witness is out of the state, or otherwise not amenable to process, an admission of truth is not required, but the continuance may be avoided by merely admitting that the testimony would be given as claimed if the witness were present.

In *Goodman v. State*, 19 Tenn. (Meigs) 195 (1838), the Tennessee Supreme Court held that where a defendant in a criminal court offers a sufficient affidavit for a continuance, stating the facts to which the absent witnesses are expected to testify, it was error to refuse a continuance, even though the prosecuting attorney offers to admit, not simply that the witness would testify to the facts stated, but also the truth of the facts stated. The Court said:

.... when the admission of the counsel for the State is not merely that the witnesses would testify as stated, but that the facts are true as set forth in the affidavit, such admission should not preclude the defendant in a criminal case from his constitutional right of having the witnesses personally present at the trial.

.... It was needless to urge how such a practice would tempt the unfortunate defendant; if he must forego the advantages of the personal attendance of his witness, to seek an undue equivalent by amplifying, at the hazard of perjury, the statement in his affidavit so as to obtain the broadest possible admission from the state. In every view, therefore, as it regards the rights of the defendant, and the safe, equal, and pure administration of justice, the practice referred to is improper and erroneous.

The decision of *Petty v. State*, 72 Tenn. (4 Lea) 326 (1880), held that:

The trial court did not err in denying the defendant's motion for a continuance because of the absence of a witness who was a nonresident and not subject to compulsory process, upon an agreement by the state that the defendant's affidavit might be read as the deposition of the witness when the court gave permission to the defendant to amend his affidavit by the addition of any other material fact he expected to prove by the witness, and instructed the jury that the affidavit was to be considered as the testimony of a credible witness. The court said when the prisoner was permitted to have the benefit of the testimony of a real or mythical witness, in language of his own, suggested and employed by himself, and deliberately penned by his attorney, without subjection to the test of a cross-examination, its ad-

mission as the testimony of a credible witness was not error of which he could complain.

In *State v. Baker*, 81 Tenn. (13 Lea) 326 (1884), where the defendant moved for a continuance because of the absence of two witnesses who were within the jurisdiction of the court but were unable to attend the trial at the time it was set because of the condition of their health, it was held that the trial court erred in compelling the defendant to go to trial upon a mere admission by the district attorney that the witnesses would testify as stated in defendant's affidavit.

The purpose of the testimony of the missing witnesses was to show that a co-defendant had a motive for shooting the victim while the defendant had none. The Court said:

> While the constitutional provision that the defendant was to have compulsory process for obtaining witnesses in his favor might not imperatively demand their presence in each case, it would all accord with the spirit of that right, where the witnesses were in reach of the process of the court, if the defendant was compelled to take a mere written statement as the equivalent of the personal presence contemplated by the use of process guaranteed to him by the Constitution.

The 1964 Tennessee Supreme Court decision of *Bacon v. State*, 215 Tenn. 268, 385 S.W.2d 107, is applicable to the case at bar. In that case the defendant was convicted of assault and battery and sentenced to pay a fine of $25.00 and serve 15 days in the county workhouse. Defendant had the Court issue subpoenas for eight witnesses, including the Mayor of the City of Knoxville. When a court officer served these subpoenas he reported to the Trial Judge all eight witnesses stated that they had no knowledge of the facts of the case. Upon receipt of this

information, the Trial Judge ordered the eight witnesses not to be called and defendant assigned error to the action of the Trial Judge. The Supreme Court affirmed the conviction and stated as follows:

> A trial judge has no discretion as to who he shall allow a defendant to subpoena. If a prospective witness is or probably will be a material one than a defendant has a constitutional right to have compulsory process. The matter turns on whether the issuance of process would in fact be an abuse of process, and, if the Court finds such is the case the Court has power to prevent such abuse.
>
> In the case at bar the trial judge refused compulsory process for witnesses requested by defendant acting upon information the requested witnesses had no knowledge of the facts under investigation, to-wit; the guilt or innocence of defendant under the indictment for assault and battery. The trial judge informed defendant of his action and reason therefor. At this point the burden shifted to the defendant to inform the trial judge the nature of the testimony to be expected from these prospective witnesses so that a determination could be made as to whether these prospective witnesses were material witnesses.

The Court in going further held:

> It is not disputed defendant has a constitutional right to compulsory attendance of witness. Defendant insists under this right it is a matter for him and his counsel to decide who these witnesses shall be. The question herefor decision is what, if any, restrictions are placed upon the Constitutional right of a defendant to have compulsory attendance of witnesses ....

The Court going further cited from Corpus Juris Secundum:

> 97 C.J.S. Witnesses § 6.—The right, when guaranteed by constitutional provision, is a real, valuable, substantive, and absolute one which may be exercised or waived by accused and of which he may not be deprived by the court, jury or legislature.
>
> While it has been declared that the court has no discretion to refuse to enforce the accused's constitutional right to compulsory process, the court may, however, refuse to permit issuance of a subpoena which, it appears, may be an abuse of process, until the court has been informed of what testimony may be expected of the prospective witness.
>
> 97 C.J.S. Witnesses § 9. A court is not required to issue compulsory process for anyone whom accused may designate as a witness; the constitutional right to compulsory process for, and only for, competent, material and resident witnesses whose expected testimony will be admissible. Within these limitations accused may obtain the attendance of any witnesses he cares to use.

In *Ezell v. State*, 413 S.W.2d 678, 220 Tenn. 11 (1967), the Supreme Court stated:

> The right of a criminal defendant to present witnesses in his own behalf is a basic constitutional safeguard; consequently, any rule which abridges this right must be examined with scrutiny.

The Court going still further commented that the Trial Judge had refused compulsory process requested by defendant acting upon information that the requested witnesses had no knowledge of the facts involved in the case.

The Trial Judge informed defendant of his action and reason therefor and the Court said:

> At this point the burden shifted to the defendant to inform the Trial Judge the nature of the testimony to be expected from these prospective witnesses so that a determination could be made as to whether these prospective witnesses were material witnesses.

The *Bacon* case, while recognizing the right of compulsory process also shows that counsel for the petitioner had complied with the requirements of Due Process. His affidavit was complete and represented material facts which the witness, Melvin Luther Cox, would have testified.

The Trial Court had previously authorized a Writ of Habeas Corpus Ad Testificandum to secure the presence of Melvin Luther Cox and his presence was prevented only by the prohibitive cost imposed by the federal government. Although petitioner did not plead indigency in this matter the great expense required to bring his brother to Chattanooga in effect denied him of Due Process.

Two Tennessee federal cases have meaning to the petitioner's case. In *United States v. McGaha*, 205 F. Supp. 949 (1962), it was held that where a prisoner in a federal reformatory outside territorial jurisdiction of court would testify that defendant had no interest in illicit distillery and that defendant did not participate in operation or control of distillery as charged, was entitled to a Writ of Habeas Corpus Ad Testificandum for such witness, and because of defendant's indigency to have government pay cost of producing such witness. The District Court upheld the right of the defendant to secure the presence of said witness and Judge Neese in his opinion held:

> This is a fundamental right which courts should safeguard with meticulous care. *Bridwell v. Aderhold*, D.C. Ga. (1935), 13 F. Supp. 253, affirmed 5 Cir., 92 F.2d 748, reversed on other grounds 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461.
>
> While the purported testimony of this witness will be negative in nature, and although the defendant is shielded by the presumption of his innocence until he is proven guilty beyond a reasonable doubt, he should not be deprived of his right to summon to his aid a witness who he believes may offer some proof to negate the government's evidence or to support his defense. *United States v. Seeger*, D.C. N.Y. (1960), 180 F. Supp. 467.

In *Cutshall v. Tollett*, 318 F. Supp. 1330 (1970), the same federal judge held that failure to give petitioner compulsory process for attendance of his available alibi witnesses constituted error of federal constitutional proportions, and, under facts, such error could not be deemed harmless.

The attempt by petitioner's counsel to take the deposition of his brother after being unable to pay the high cost of transporting him to Chattanooga is not unknown to Tennessee law. Tennessee Code Annotated, Section 40-2428 provides:

> *Depositions* — The accused may, by order of the court, have the depositions of witnesses taken in the manner prescribed for taking depositions in civil cases, on notice to the district attorney.

In the principal case the Trial Judge had previously granted petitioner's request to have his brother present to testify in his behalf. The inability to produce the witness was because of the prohibitive costs established by

the government. The only alternative available to petitioner to obtain the testimony of Melvin Luther Cox was to request that his deposition be taken. Such application was made to the Trial Judge who refused to continue the trial for this purpose although the record clearly shows that no prejudice would have resulted to the State. This action denied petitioner of his constitutional right to Compulsory Process under the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Tennessee Constitution.

CONCLUSION

The petitioner respectfully submits that the refusal of the Trial Judge to grant petitioner a continuance in order to take the deposition of a material and essential witness deprived him of Due process of law under the Fourteenth Amendment of the United States Constitution and Article I, Section 8 and the Tennessee Constitution, and the right to Compulsory Process under the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Tennessee Constitution. It is further respectfully submitted that the conviction in this cause is void and should be set aside and this matter be remanded to the trial court for a new trial.

Respectfully submitted,

JERRY H. SUMMERS
206 Professional Building
Chattanooga, Tennessee 37402

CARTER SCHOOLFIELD
307 Professional Building
Chattanooga, Tennessee

Schoolfield & Taylor
Of Counsel

APPENDIX A

THE COURT OF CRIMINAL APPEALS OF TENNESSEE

KNOXVILLE, JUNE 1972 TERM

CHARLES EDWARD COX
Plaintiff in Error

v.

STATE OF TENNESSEE
Defendant in Error

NO. 300

Hamilton County
Honorable Campbell Carden, Judge
(Armed Robbery)

For Plaintiff in Error:

Carter Schoolfield
Chattanooga, Tennessee

For Defendant in Error:

David M. Pack
Attorney General
of Tennessee

Alex B. Shipley, Jr.
Assistant Attorney General
Nashville, Tennessee

Stanley Lanzo
Franklin Groves
Assistant District
Attorneys General
Chattanooga, Tennessee

OPINION FILED: .....

AFFIRMED

W. Wayne Oliver
Judge

[fol. 1] **OPINION**

[Filed November 28, 1972]

Convicted of armed robbery and sentenced to imprisonment for 10 years in the penitentiary, Cox has duly perfected an appeal to this Court. His only Assignment of Error is that the trial court erred in denying his motion for a continuance in order to take the deposition of his brother, Melvin Cox, who was imprisoned in the Federal Penitentiary at Leavenworth, Kansas.

The defendant's insistence was and is that this brother Melvin committed the robbery and that he had nothing to do with it and that Melvin would have so testified.

In an affidavit filed with the motion for a continuance, defense counsel stated that Melvin Cox would testify that he and one Jones committed the robbery of the By-Ryt Supermarket and that the defendant was not involved in any way, and that he (Melvin) was driving his mother's automobile at the time of the robbery; that on November 5, 1971 the affiant received permission from the Director of Federal Bureau of Prisons to file a Writ of Habeas Corpus Ad Testificandum for the purpose of securing the attendance of Melvin Cox as a witness; that three or four days later the United States Marshall at Chattanooga informed him that a deposit of $2,000 with that office would be necessary to secure the attendance of Melvin Cox; that on November 29, 1971 the defendant's mother informed him that the family was unable to pay that amount but could defray the expense of taking Melvin's deposition. Such a deposition is authorized by TCA § 40-2428.

The continuance motion was filed December 1, 1971 and was presented to the court the following morning when the case was called for trial. In overruling the motion,

[fol. 2] the court reviewed the history of the case from the court file and noted that the case was first set for trial on September 15, 1970 and was reset for January 6, 1971; that on the latter date the indictment was amended by agreement and the case was then set for trial on April 1, 1971; that the trial proceeded on April 1, 1971 and after presentation of most of the State's proof a mistrial was entered because it was found that the indictment was defective and it was quashed and recommitted to the Grand Jury; that a new presentment was returned by the Grand Jury on June 30, 1971 and on July 6th the court set the case for trial on September 28, 1971; that on the latter date the defendant moved the court to order the Attorney General to have Melvin Cox returned and the case was continued until November 24, 1971 when it was reset for December 2 (the date of trial); and that "only here lately" (apparently September 28, 1971) was any mention made of the necessity for having Melvin Cox as a witness.

It is settled law that a motion for a continuance is addressed to the sound judicial discretion of the trial judge, and that his judgment will not be disturbed in the absence of a clear showing, by something developed in the trial, that he abused his discretion to the prejudice of the accused. *State ex rel. Carroll v. Henderson*, 1 Tenn. Crim. App. 427, 434, 443 S.W.2d 689; *Oden v. State*, 2 Tenn. Crim. App. 304, 453 S.W.2d 441; *Moorehead v. State*, 219 Tenn. 271, 409 S.W.2d 357.

We summarize the evidence material to the insistence that the trial court erred in denying a continuance. About 5:00 p.m. May 11, 1970, two men entered the By-Ryt Supermarket in Hamilton County and at gunpoint ordered one employee to open the safe and one of them fired into the floor near his feet when he told them he could not open

the safe and no one was present who could. The
[fol. 3] robbers then forced the cashier to empty the contents of three cash registers into a paper sack and then fled in a yellow Chevrolet which turned out to belong to the defendant's mother. Shortly thereafter, that vehicle was spotted by an officer who heard the police broadcast about the robbery, and he followed it until it stopped at the residence of the defendant's brother, Clyde Cox. Two men, one of whom the officer identified as Jessie Jones, got out of the vehicle and fled on foot when they saw the officer. In the yard near the vehicle was found a paper sack containing "doughball tickets" which were among the contents of the cash registers emptied into a paper sack for the robbers.

That night, the three employees of the store who witnessed the robbery separately viewed police photographs and each of them identified a photograph of the defendant as the robber who held the gun. Each of them also so identified him in court at the trial. Two of those witnesses testified that at the time of the robbery the defendant wore his hair in a crew cut, and the third witness characterized his hair style as a "drake." Two of the witnesses were shown four photographs introduced by the defense, three of which were pictures of the defendant with long hair, and the fourth was a picture of Melvin Cox wearing his hair in a crew cut. Both witnesses said they had never seen Melvin Cox before and that he was not one of the men who robbed the store.

The defendant testified that about 10:00 a.m. on May 11, 1970 he arrived at his mother's home, which was next door to his, and that he never left there until several days later; that around 12:00 p.m. that day his brother Melvin Cox came to the house and borrowed his mother's

car; that around 7:00 p.m. he learned that he was wanted for the robbery and hid at his mother's house for a few days and then went to Kentucky because he knew [fol. 4] that Melvin had committed the offense and did not wish to incriminate him; that, although Melvin always wore his hair in a crew cut, he has never done so himself; and that subsequently he and his brother Melvin and Jessie Jones were charged with murder in Idaho and he was exonerated but Melvin and Jones were tried and convicted.

The defendant's mother testified that he came to her home on May 11, 1970 and remained there the remainder of the day and that night; that about 2:00 p.m. her son Melvin came to the house and asked to borrow her car to go to see Jessie Jones and left around 3:30 or 4:00 p.m.; and that about 5:55 p.m. the same day her son Frank called and told her about the robbery and that another son, Clyde, had been arrested in connection with it; that subsequently Melvin and Jessie Jones were tried and convicted of robbery and murder in Idaho but the FBI cleared the defendant of any complicity in those crimes, and that his and Jones' pictures appeared in the paper at that time.

The defendant's brother Clyde Cox testified that on May 11, 1970 while he was sitting out on a patio at his house his brother Melvin and another man pulled up in a car, with the police right behind them, and stopped and got out and started running; that he himself was arrested in connection with the robbery but was released that night and then telephoned his brother Frank and told him what had happened; that the defendant has never worn his hair in a crew cut but Melvin always did.

The defendant's motion for a continuance, with his attorney's affidavit attached thereto, was only a pleading,

and the statements contained therein did not constitute evidence that Melvin Cox would come into court and testify, or say by deposition, that he was one of the rob-
[fol. 5] bers and that the defendant was not. Nor does the testimony of the defendant or any of his witnesses furnish any such evidence; not one of them indicated that Melvin would so testify. Thus, the inescapable result is that there is not a shred of evidence in this record to support the defendant's contention that he was prejudiced by denial of his motion for a continuance for the purpose of taking Melvin's deposition.

The burden rests upon a party assigning errors in connection with matters of continuance to show that the action of the court was prejudicial. Appellate courts will look to the result of the trial before them. The only test that may be applied is whether one has been deprived of his rights and whether an injustice has been done. The reviewing court will consider the entire record for the purpose of determining whether or not the judgment rendered was proper. A reversal will be ordered on account of denial of a continuance only if the appellate court is convinced that the complaining party did not have a fair trial and that a different result would or might reasonably have been reached had there been a different disposition of the application for a continuance. *Tennessee Procedure in Law Cases*, Higgins & Crownover, § 885.

Upon this record we cannot say that the trial court abused its discretion to the prejudice of the defendant in denying his motion for a continuance. Let the judgment of the trial court be affirmed.

/s/ W. Wayne Oliver
W. Wayne Oliver
Judge

Concur:

.....
William S. Russell
Judge

.....
John D. Templeton
Special Judge

APPENDIX B

SUPREME COURT OF TENNESSEE
AT KNOXVILLE

SEPTEMBER TERM 1972

[fol. 1] **DECREE**

(Filed February 5, 1973)

Charles Edward Cox — Hamilton Criminal

Vs. — WRIT DENIED

State of Tennessee

This case coming on to be heard upon a transcript of the record from the Criminal Court of Hamilton County, opinion and decree of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

The petitioner Charles Edward Cox will pay the costs incident to filing petition for certiorari, for which let execution issue.

Ross W. Dyer
Chester C. Chattin
Allison B. Humphreys
George F. McCanless
John W. Wilson

APPENDIX C

[fol. 1] **INDICTMENT**

**IN THE
CRIMINAL COURT OF HAMILTON COUNTY,
TENNESSEE — DIVISION I**

June 30, 1971

Court met pursuant to adjournment, present and presiding the Honorable Campbell Carden, Judge, etc., when the following proceedings were had, to-wit:

* * * * * * * * *

119343 - State v. Jessie Jones and

119344 Charles Edward Cox – Armed Robbery

P – 36–763 and P – 36–764

No. 119343 – 119344

A TRUE BILL

/s/ M. C. Gross
Foreman of the Grand Jury

CHARGE: ARMED ROBBERY

/s/ M. C. Gross
Foreman
/s/ [signature illegible]
/s/ Paul Bussell
/s/ Bill Bass

STATE OF TENNESSEE
vs.
Jessie Jones and
Charles Edward Cox

.....
Prosecutor

/s/ Jimmy Sharrouk
/s/ Raymond Swanson
/s/ Arnold Gill
/s/ [signature illegible]
/s/ Mary E. Phifer
/s/ Marie R. [illegible]
/s/ Richard Slaten
/s/ Frank Jordan
/s/ Thomas D. Wright

CLERK'S SUMMONS FOR THE STATE

Elwood Slaten, 1600 Keeble St. 867-7514

C. L. Westbrook, County Jail

Glenn Broyles, c/o E. Ridge Police Dept.
Ros Arden, c/o By-Ryt Super Market, No. 5, (892-6800)
Coy Parker, 908 Givins Road wks.: By-Ryt Super Market, No. 5, 894-9519
Mrs. Coy Parker, 908 Givins Road, 894-9519
Cleo Short, 2732 Silverdale Rd., 892-9114

EDWARD E. DAVIS,
Attorney-General

FILED IN OFFICE
71 Jun 30 PM 2:24
CLYDE M. SANDERS,
CLERK
Per .....D.C.

[fol. 2] INDICTMENT - continued:

STATE OF TENNESSEE, HAMILTON COUNTY

119343
119344

Criminal Court June Term, 1971

THE GRAND JURORS for the State aforesaid, being duly summoned, elected, impaneled, sworn and charged to inquire for the body of the County aforesaid, upon their oath present:

That Jessie Jones and Charles Edward Cox

heretofore on the 11th day of May, 1970, in the County aforesaid, did unlawfully, feloniously and forcibly take from the person of Cleo Short, an employee of By-Ryt Super Market No. 5, Inc., a corporation, the following described personal property, to-wit: $585.00 in good and lawful money of the United States of America, to the total value of $585.00, the property of By-Ryt Super Market No. 5, Inc., a corporation, with intent to convert the same to their own use and to deprive the true owner thereof, by the use of force and violence, by the use of a dangerous and deadly weapon, to-wit: a pistol, and by putting the said Cleo Short in fear of bodily injury, against the peace and dignity of the State.

.....
Attorney General

****

Thereupon, Court adjourned pending further business of the Court.

/s/ Campbell Carden, Judge

APPENDIX D

MOTION FOR ORDER REQUIRING STATE TO FILE HABEAS CORPUS AD TESTIFICANDUM

MOTION

Filed: September 28, 1971
C. M. Sanders, Clerk

STATE OF TENNESSEE	NO. 119344
VS	IN THE CRIMINAL COURT OF HAMILTON
CHARLES EDWARD COX, ET AL	COUNTY, TENNESSEE DIVISION 1

Comes now the defendant, CHARLES EDWARD COX, by and through his attorneys, SCHOOLFIELD & TAYLOR, and moves the Court for an Order requiring the Attorney General to file a Writ of Habeas Corpus Ad Testificandum for one Melvin Luther Cox, now incarcerated by the United States Government.

SCHOOLFIELD & TAYLOR

/s/ Carter Schoolfield
Attorneys for Defendant

[fol. 2] STATE OF TENNESSEE)
COUNTY OF HAMILTON)

I, Carter Schoolfield, after first being duly sworn, makes oath that after conference with my clients, and investigation of the above styled case, I verily believe that it is necessary to have the said Melvin Luther Cox, present for the trial of Charles Edward Cox and that he is a

material witness and he would testify in substance that he in fact is the person that committed the "armed robbery" of the By-Rite Supermarket, as charged in the indictment in this cause.

Further, I aver that I have no way of compelling the attendance of the said Melvin Luther Cox in this cause other than requesting an Order of this Court for a Writ of Habeas Corpus Ad Testificandum with the Federal authorities.

I further aver on the information and belief that the said Melvin Luther Cox is now incarcerated in the Federal Penitentiary at Levenworth, Kansas, and it will be necessary for the said Writ to issue.

/s/ Carter Schoolfield
CARTER SCHOOLFIELD

Sworn to and subscribed before me
this the 28 day of Sept., 1971.

/s/ John B. Taylor
NOTARY PUBLIC

My commission expires: Jan. 16, 1972

APPENDIX E

[fol. 1] [Caption Omitted]

MOTION TO CONTINUE

Filed: December 1, 1971
C. M. Sanders, Clerk

Comes now the defendant, Charles Edward Cox, and moves the Court for an Order to continue the case because the material witness, Melvin Luther Cox, is now in the Federal Reformatory at Levenworth, Kansas, and the defendant's attorneys are unable to secure his presence for trial and are desirous of taking his deposition.

SCHOOLFIELD & TAYLOR

/s/ Carter Schoolfield
Attorneys for Defendant

[Certificate of Service Omitted]

[fol. 1] [Caption Omitted]

I, Carter H. Schoolfield, make oath that Melvin Luther Cox is a material witness in the case of State of Tennessee v. Charles Edward Cox, charge, "armed robbery" and that if he were called to testify he would testify that on the date and day in question, that he and a man by the name of Jones committed the robbery of the By-Rite Supermarket and that in fact, Charles Edward Cox was not in any way involved with the robbery.

He would further testify that he is the brother of Charles Edward Cox and that he was driving the automobile belong-

ing to his mother, Dorothy Cox, when the robbery was committed.

Further, I, Carter H. Schoolfield make oath that on or about the 19th day of October, 1971, pursuant to the Federal Law, in respect to requesting the presence of prisoners to testify, I wrote the Honorable Norman Carson, Director of the Federal Bureau of Prisons in Washington, D.C., requesting permission to file a Writ of Habeas Corpus Ad Testificandum to produce Melvin Luther Cox as a witness in this cause, a copy of said letter which is attached. That on the 5th day of November, 1971, I received a telegram from J. B. Bogan, Assistant Director of the Bureau of Prisons, granting permission to file the Writ of Habeas Corpus Ad Testificandum for the production of Melvin Luther Cox, a copy of which is attached. That within 3 or 4 days from receipt of this telegram, I received a telephone call from the United States Marshal at Chattanooga, Tennessee, informing me before the said Melvin Luther Cox could be produced that a cashiers check in the amount of Two Thousand ($2,000.00) Dollars would have to be deposited with the Marshall's office at Chattanooga, Tennessee. I then informed the defendant of this and they felt that they could raise this amount of money. That on the 29th day of November, 1971, I had a conference with the defendant's mother and it was determined that they were unable to raise the requested amount.

[fol. 2] However, they are financially able to raise the required amount to take the deposition of the said Melvin Luther Cox.

Further, it is the opinion and judgment of the defendant's attorney that the testimony of Melvin Luther Cox is vital to the defense in this cause and that the defendant

would not receive a fair and impartial trial without the testimony of Melvin Luther Cox.

THIS THE 1st DAY OF December, 1971.

/s/ Carter Schoolfield
CARTER H. SCHOOLFIELD

Sworn to and subscribed before me
this the 1st day of December, 1971.

/s/ John B. Taylor
NOTARY PUBLIC

My Commission Expires: Jan. 16. 1972

[fol. 1] [Caption Omitted]

MOTION FOR ORDER TO TAKE DEPOSITION

Filed: December 1, 1971
C. M. Sanders, Clerk

Comes now the defendant, Charles Edward Cox, and moves the Court pursuant to Section 41-2428 of the *Tennessee Code Annotated*, for an Order allowing the defendant to take the deposition of Melvin Luther Cox, now and out of the State of Tennessee in the Federal Reformatory at Levenworth, Kansas.

SCHOOLFIELD & TAYLOR

/s/ Carter Schoolfield
Attorneys for Defendant

[Certificate of Service Omitted]

APPENDIX F

[Caption Omitted]

EXCERPTS FROM TRANSCRIPT OF TRIAL

[1] APPEARANCES

FOR THE STATE OF TENNESSEE: Stan Lanzo, Esq., Frank Groves, Esq., Asst. Attys. Gen.

FOR THE DEFENDANT: Carter Schoolfield, Esq. John Taylor, Esq.

BE IT REMEMBERED, the above-styled case came on to be heard on this the 2nd day of December 1971, in the Criminal Court for Hamilton County, Sixth Judicial Circuit of Tennessee, before the Honorable R. Campbell Carden, Judge of the First Division.

Upon the hearing of the cause the following proceedings were had and evidence adduced, to-wit:

THE COURT: I believe we have some preliminary motions before we consider selection of the jury. So, jurors, before we start you can make yourselves comfortable in the jury room. And other jurors, we'll have to ask you to step out in the hall because we are going to have to hear a couple of legal questions in this case.

(Thereupon, the prospective jurors retired to
[2] the jury room and outside the courtroom, and the following proceedings were had in the absence of prospective jurors.)

THE COURT: Mr. Schoolfield, I believe you filed two

motions that I see here; one a motion to continue in this case of State vs. Charles Edward Cox, inasmuch as you allege a material witness, Melvin Luther Cox, is now in a Federal Reformatory at Leavenworth, Kansas, and defendant's attorneys are unable to secure his presence for trial and are desirous of taking his deposition. Your second motion, of course, is a motion to permit the taking of a deposition of Melvin Luther Cox pursuant to Section 40-2428 of the code, and you have your affidavit attached thereto, giving details as to what you would expect this witness to testify to. I'll leave that up to you to bring out, however.

MR. SCHOOLFIELD: Yes, Your Honor. Basically the testimony is, as alleged in the affidavit, that he, in fact, is the person who committed this robbery, along with his co-defendant, Jessie Jones. And in addition, Your Honor, the affidavit alleges that we, in October, I believe, of 1971, we wrote, pursuant to the Federal Law and Regulations, we wrote a letter to the Bureau of Federal Prisons in Washington, requesting permission to file a writ of habeas corpus ad testificandum. And as an exhibit to the affidavit we received a telegram from the Bureau of Prisons granting permission to file a writ of habeas corpus ad testificandum. And then in addition, in the affidavit it alleges that a few days after the receipt of the telegram, I don't recall the exact date so I didn't put it in the affidavit, we took a—we received a telephone call rather from the United States Marshal in Chattanooga, stating that in order to bring the man back they would have to have deposited with them a cashier's check in the amount of $2,000.00. I discussed this with the defendant and his family and they were in hopes of being able to raise this amount of money, and shortly, this week they determined that they were unable

[3]

to raise any such figure as this. So I then notified the Attorney General Tuesday of this week of the situation and took the matter up, I think, with Your Honor yesterday briefly, and filed these motions in order to take this man's deposition. Now this witness' testimony, Your Honor, is very material to the defense in this case, and I think probably in order to insure a fair and impartial trial, and I realize this case has drug somewhat, partly because of the fact, and I think the indictment has had to be quashed on two different occasions for errors in it. I think we have even agreed to the indictment being recommitted to the Grand Jury, and that's one of the reasons. In addition, Your Honor, this issue, of course, as Your Honor well knows, is a very serious case. The defendant stands to receive a minimum of ten years and a maximum of death penalty in this case. And I feel like that in order to insure an absolutely fair and impartial trial that this
[4] continuance should be granted. We have made the application and the family has secured the funds in order to take the deposition in any event, and we can do it at any time. I don't want to delay this case any longer than necessary. I want to dispose of it as soon as possible. I respectfully submit that this case should be continued. I don't think it will prejudice the State of Tennessee in any respect for it to be continued. Their witnesses are all local; there's no problem in getting them here. And I think in the light of the affidavits and in the light of the case law that this should be done. Now this question on this deposition, I assume it is a discretionary matter with the Court from the statute.

THE COURT: What I wrote down is your citation in there, 41-2428. I can't—I don't—it must be an error. I don't find it—

MR. SCHOOLFIELD: (Interposing) Well, it may be—

MR. GROVES: (Interposing) It's 40, Your Honor.

THE COURT: It's 40-2428?

MR. SCHOOLFIELD: I apologize, Your Honor. I thought it was 41.

THE COURT: All right. Go ahead, Mr. Schoolfield.

MR. SCHOOLFIELD: I assume, Your Honor,
[5] that it is a discretionary matter with the Court.

The case law in respect to that says that the Attorney General cannot even agree to take the deposition. It has to be done on order of the Court or by leave of the Court in any event. However, I think that in fairness to the parties and so forth, where you have a witness who would testify to such facts as we have here as alleged in this affidavit, that the exercise of sound discretion would be to allow the deposition to be taken in lieu of having the witness here under the circumstances. That is the reason we filed a motion requesting the order of taking. Now it has to be done on notice just as if you were taking a civil deposition, as I understand it, but I assume this motion must be filed, or leave of the Court granted before we can even file the notices to take the deposition on the Attorney General. This, of course, is done in the identical way that a civil deposition is taken according to that statute. And I do respectfully submit that the Court should allow this deposition to be taken.

MR. LANZO: Your Honor, our position simply is that this offense occurred back in May of 1970. It's been partially tried, inasmuch as most of the State's proof was put on in one previous trial, and there was a mistrial because of faulty indictment. But after that, the last time that this actually came to trial was sometime, on September
28th. At that time Mr. Schoolfield represented
[6] to the State and to the Court that there was this other witness, this other brother that was the one

that—his theory of the case was the one that was involved in it. We, the State, at the time did not really resist it and gave him the opportunity to have the man here. We even explained to Mr. Schoolfield that we realized it would hurt our case because if we started talking about this other man we were going to use our theory just where was he. And from September 28th until the present date Mr. Schoolfield has had an opportunity to have him here. He didn't give us notice until this deposition request until a week ago—in fact, it wasn't either; it was this week. And our position is simply that the longer this thing is delayed the more apt that one of our witnesses to become missing and the case become destroyed for the State. And we just don't want any further delays. We're ready for trial today, as we were ready September 28th for trial. And we just feel as though we can't agree to it, and it's just our position simply that we don't want any further delays and we want to go on to trial so that we don't totally destroy our case.

MR. SCHOOLFIELD: Your Honor, I might add one other thing. This witness, Melvin Cox, had been up until recently a fugitive from justice. And, of course, we had no way of finding him. And at the time these matters were before, he was not even in custody by the Federal authorities or anyone else until recently.

THE COURT: I refer to your affidavit attached
[7] to one of the motions, wherein you indicate that if this Charles Edward Cox were—in this case rather, if Melvin Luther Cox were called to testify he would testify in a certain manner; that he and another man by the name of Jones committed the robbery of this By-Ryt Supermarket. Now what do you have to substantiate that part of your affidavit?

MR. SCHOOLFIELD: Your Honor, I have the state-

ments of the defendant's mother, and also the mother of Melvin Cox, and also a letter from Melvin Cox to his mother that I read, and that is the basis of it. I have not talked to Mr. Cox directly, he being a fugitive up until recently. And then I also have the testimony, which I will produce in any event, of his mother as to the car that was used in this robbery belonged to Mrs. Cox, Mrs. Clyde Cox, and this was the car that she loaned to her son, Melvin Cox.

THE COURT: Of course, I see here what I believe purports to be a telegram to you from some Federal authority, indicating that this Melvin Luther Cox would be subject to being brought here on the proceeding writ of habeas corpus ad testificandum, that he is considered —well, it indicated that extreme caution was necessary in transporting him as he was assaultive and very dangerous. Isn't he the—I don't know whether he's been convicted of murder, but was he not—did he not have armed robberies and murder charges against him?

[8] MR. SCHOOLFIELD: Yes, sir, Your Honor. He and this Jessie Jones, who's a co-defendant in this case, were—have been charged and I don't know all the details, but I think they have been tried for an armed robbery of a bank in East Tennessee. Mr. Jones and Mr. Melvin Cox, Melvin Luther Cox, were tried for an armed robbery of a bank committed up here in East Tennessee. This is my understanding of it. Prior to this they were charged with some armed robberies in the western part of this country. After this, both of these defendants, Jones and Cox, Melvin Cox, Melvin Luther Cox, were charged with a series of armed robberies and I think one or two murders out in the western part of the United States after this incident in question here. Proof would show that they were tried and convicted I think of armed rob-

bery of a bank in East Tennessee prior to this. Subsequent to this these two same defendants, same persons, Jones and Cox, Melvin Cox, were tried for the offenses out in Idaho and, I believe, Washington or Oregon after this. That is my understanding of it. And that is the reason that I feel it is so vital that we have his testimony in some form. Now this question of this man's extreme dangerous propensities I think is probably true. It's my recollection he has been tried for one of these murders out in the west and I don't know what the disposition of it is. He is in a Federal Reformatory though at this time; not in some State Reformatory.

[9] THE COURT: Looking at the file jacket, of course, which shows various steps that have been taken, it appears that we had it, among other actions we had taken, we had it set for trial as of September 15th, 1970, we set this case for trial January 6, 1971. And then on that date the indictment was amended by agreement and the case re-assigned to April the 1st, 1971. Of course, there is, I believe, in the file this particular indictment showing the agreed amendment as to identifying the particular store involved. There was some little identification variation. And then on April the 1st, when we had it set for trial, the case went on to trial, and after presentation of most of the State's proof there was some other problem found. And the indictment, which was amended, was quashed. It was referred back to Grand Jury for correction. And, of course, a new presentment or indictment came out thereafter.

MR. SCHOOLFIELD: Your Honor, during these times, as I understand it, Mr. Melvin Luther Cox was at that time a fugitive from justice.

THE COURT: Well, that was going to be the next question, that during all this time there seemed to have been

no mention whatsoever of the necessity for having this Melvin Luther Cox available, and only here lately has that matter come up. After this new presentment came out June the 30th, 1971, as of July 6th, 1971 we set the case for trial on September 28th. And on that
[10] day we had to continue it to October 4th. State was ready and it was on motion of defendant. I don't recall, and it doesn't show on here just what the reason was we had to re-assign it.

MR. LANZO: Your Honor, I might interrupt, I think at that time there is another affidavit in there by Mr. Schoolfield representing that this Melvin Cox was a witness that he filed after we had passed it on the 28th.

THE COURT: Well nevertheless, September 28th there was a motion for the Court to order the Attorney General to have Melvin Luther Cox brought back, and there were other steps taken. Anyway the case was again set for trial November 24th. Then on that day it was re-assigned to December the 2nd, that is, today. And I believe it was for the purpose of having him — or having efforts made to see if he could be returned, that is, Melvin Luther Cox. All things considered I'll overrule the motions to continue and to take the deposition of Melvin Luther Cox.

Anything further we need to do now?

MR. LANZO: Not from the State, Your Honor.

MR. SCHOOLFIELD: Your Honor, we would like our exceptions noted in this case.

THE COURT: All right. Let the record show that exceptions have been noted to my rulings on each of these motions.

* * *

APPENDIX G

JUDGMENT

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE — DIVISION I

December 2, 1971

Court met pursuant to adjournment, present and presiding the Honorable Campbell Carden, Judge, etc., when the following proceedings were had, to-wit:

****

119344 State v. Charles Edward Cox – Armed Robbery

Came the Attorney General and the defendant in person with his attorneys, Mr. Carter Schoolfield and Mr. John Taylor, and this case came on for trial on the defendant's plea of not guilty before the Court and the following jury, to-wit: Robert L. Booker, Julius H. Hamilton, Johnnie L. Harrington, Elizabeth W. Freeman, A. A. Hudson, Edward L. Patterson, John D. Thacker, Don Walker, Robert K. Weatherly, S. A. McMichen, N. B. Whitehead, Jr. and Henry W. Kelley, all duly qualified, elected and sworn, who having heard the proof, arguments of counsel and the charge of the Court, on their oaths say defendant is guilty of Armed Robbery, and fix his punishment at not more than 10 years in the penitentiary.

Upon the verdict of the jury, it is the judgment of the Court that defendant be infamous and that he be confined in the State Penitentiary for a term of 10 years and pay the costs of the cause. Execution will issue against the defendant for the costs.

Defendant is further allowed 10 days within which to file a Motion For New Trial herein.

Defendant is further allowed to remain at liberty on the same bond pending hearing on said Motion For New Trial.

****

Thereupon, Court adjourned pending further business of the Court.

/s/ Campbell Carden
Judge

APPENDIX H

EXCERPTS FROM TRANSCRIPT OF TRIAL TESTIMONY OF ELWOOD SLAYTON

* * *

[24] *** pictures?

A We were shown some pictures here at the courtroom once before when we'd been down here for the trial.

Q How long was it after—Mr. Slayton?

A Slayton.

Q Mr. Slayton, was it that you saw the defendant in person again? About how long after this incident in May of '70?

A Approximately a year.

Q Approximately a year?

A Yes, sir.

Q Did you ever view a line-up or anything with him in it?

A No, sir.

Q You were never brought down to the jail and looked to see if he were in a line-up?

A Yes, I viewed a line-up; he was not in it.

Q I understand, but I'm talking about later?

A No, sir.

Q When he was arrested on this charge?

A No, sir.

Q Was his hair about the same length as it is now?

A No, sir, he had a crew-cut at that time, flat-top.

Q He had a crew-cut flat-top?

* * *

APPENDIX I

EXCERPTS FROM TRANSCRIPT OF TRIAL TESTIMONY OF COY PARKER

* * *

[51] *** a period of four or five minutes on direct examination when Mr. Lanzo was asking you?

A I didn't just hold my eye on him, but during the time after he fired the gun he got all of our attention. And from there on I was—my visual contact was off and on him the rest of the time.

Q You got a pretty good look at the person—

A (Interposing) I sure did.

Q What—how did he have his hair cut, Mr. Parker? Was it a short, flat-top hair cut, or a long hair cut—

A (Interposing) No, it was short.

Q A short flat-top?

A Sort of a flat-top; yes, sir.

Q Wasn't real long?

A No, sir.

Q This car that the Attorney General showed you, are you saying this was the car that you saw leave the store?

A I'm saying the description is the same as this car here. I do remember that it was a yellow car; it was a Chevrolet. And I remember that the license plate was hanging down to where you could not see the plate at all.

Q When is the first time that you ever saw this car, Mr. Parker?

A When it left that parking lot as far as I know.

Q Could you tell how many people were in the car?

* * *

[169] A No, sir; never seen this man before.

Q And I'll ask you specifically if you saw him on the 11th day of May 1970, in the By-Ryt Food Market shortly after 5 o'clock?

A I did not.

Q He was not in the store there?

A No, sir.

Q And you're positive about that?

A I am very positive.

RECROSS-EXAMINATION

BY MR. SCHOOLFIELD:

Q Mr. Parker, you identified the person who had the gun as having short hair, did you not?

A Yes, sir.

Q All right. Which one of these pictures did you identify, Mr. Parker? Was it this one that Mr. Westbrook said you picked out?

(Thereupon, Defense Exhibit No. 1 was handed to the witness for examination.)

MR. LANZO: (Interposing) We'll object, Your Honor; we'd like to have him look at them all rather than one at a time.

MR. SCHOOLFIELD: I asked him if he can—

THE COURT: (Interposing) He can answer if he wishes, if he knows or doesn't know.

[170] A I don't—this doesn't look exactly like the picture I remember.

Q All right, sir. Let me show you this one.

(Thereupon, Defense Exhibit No. 3 was handed to the witness for examination.)

MR. SCHOOLFIELD TO THE COURT: That, may it please the Court, was State Exhibit No. 1.

A No, sir.

Q That's not it?

A This is not the picture.

Q All right, sir. Now that is State's Exhibit No. 3, I mean, Defense Exhibit No. 3. This photograph.

(Thereupon, Defense Exhibit No. 2 was handed to the witness for examination.)

A This doesn't look like the picture that I viewed.

Q Did you view a photograph of this man with short hair?

A His hair was not a flat-top as we know a flat-top.

Q You said short hair?

A Yeah, it was short, I mean, it wasn't hanging or sticking up, see.

Q Like it is now?

A Right.

* * *

APPENDIX J, K & L

EXCERPTS FROM TRANSCRIPT OF TRIAL TESTIMONY OF CHARLES EDWARD COX

* * *

[88] *** pause a moment?

MR. GROVES: Yes, Your Honor.

THE COURT: All right. Let's have a short recess, jurors.

(Thereupon, a short recess was had.)

THE COURT: Does the State have any further proof?

MR. GROVES: Your Honor, that will conclude the proof to be introduced by the State in its case in chief. We have one further witness, Mr. Glenn Broyles, who is available to the defense in this case.

THE COURT: Well, the State rests then?

MR. GROVES: Yes, Your Honor.

THE COURT: All right.

CHARLES EDWARD COX,

called as a witness on his own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHOOLFIELD:

Q State your name to the Court and jury?

A Charles Edward Cox.

Q Most people know you by Eddie?

A Yes, sir.

Q Where do you live, Eddie?

A Chickamauga, Georgia, Route 1.

Q And is that in the Chickamauga community actually,

[89] or what?

A Yes, sir, right at the edge of Chickamauga; Wallaceville.

Q All right. How old are you?

A Twenty-seven.

Q And do you work anywhere?

A Yes, sir.

Q Where do you work?

A Rossville; construction.

Q All right. How far did you go in school, Eddie?

A To the ninth grade.

Q Are you married?

A Yes, sir.

Q Do you have any children?

A Two.

Q How old are they?

A Three and two.

Q Is your wife here today?

A No, she's at Moccasin Bend.

Q She is in Moccasin Bend Hospital? What's the matter with her?

A Just nerves.

Q How long has she been in there?

A About two weeks.

Q Where are your children?

[90] A Down at the house, my mother's.

Q At your mother's? Eddie, now let's start out, you've been in trouble before, have you not?

A Yes, sir.

Q Tell the Court and jury about what trouble you've been in with respect to the law?

A When I was eighteen or nineteen, it's been so long, they got me for burglary, and I pled guilty to that. Then they got me for burglary a couple of years ago; pled guilty

to that.

Q All right.

A (Continuing) And that's all.

Q Was that burglary before or after this incident that we're here trying today?

A It was all before.

Q All before. All right. At the time this thing happened were you working?

A This robbery?

Q Yes, sir.

A Yes, sir.

Q All right. Now, Eddie, let me ask you this, did you go in that store?

A No, sir.

Q That night?

A No, sir.

[91] Q All right. When did you first hear of a robbery or anything?

A When my brother called down at the house and told my mother that—

MR. LANZO: (Interposing) Object to the hearsay.

MR. SCHOOLFIELD: Don't tell what—

THE COURT: (Interposing) Sustain the objection.

Q I'm sorry. Don't tell what your brother said or anything like that. He's here, is he not?

A Yes, sir.

Q All right. You heard about it by virtue of a telephone call?

A Yes, sir.

Q And where were you at that time?

A I was home.

Q All right. And where is home?

A I was living with my mother then; I live right next door to her.

Q All right. Were you there at your mother's house or what?

A Yeah, it was Mother's house.

Q All right. And you were at your mother's house. All right. Did you later find out where your brother was?

A Yes, sir.

Q Where?

[92] MR. LANZO: (Interposing) I object to that, Your Honor; it would be hearsay.

THE COURT: Sustain it if it is.

MR. SCHOOLFIELD: It is, Your Honor; I apologize.

THE COURT: All right.

Q I want to show you a picture that has been introduced for identification only, and ask you—it's exhibit No. 4, and ask you if you recognize that picture?

(Thereupon, Defense I.D. Exhibit No. 4 was handed to the witness for examination.)

A Yes, sir.

Q Who is that?

A It's my brother.

Q What is his name?

A Melvin—Melvin Cox.

Q All right. Is it Melvin Luther Cox?

A (Witness nods head, indicating yes.)

Q Where is he now?

A He's in Marion, Illinois, Federal Penitentiary.

Q What's he there for?

A For murder and armed robbery.

Q All right. Now would you make that an exhibit to your testimony?

A Yes, sir.

[93] (Whereupon, copy of photograph referred to above was received in evidence and marked Defense Exhibit No. 4.)

Q That picture was made—when does it show?

A First month, thirteenth day in '67.

Q Does that show what your brother looked like exactly in 1970?

A Yes, sir.

Q Is his weight any different at all?

A He's littler than that; he's slimmer.

Q Slimmer? All right. How many brothers do you have, Eddie?

A Three.

Q What are their names?

A Marvin, Melvin, Frank and Clydie.

Q All right. Marvin, Melvin, Frank and Clydie, and yourself; there's five of you boys? All right. How does Melvin always wear his hair?

A Crew cut.

Q A crew cut?

A Yes, sir.

Q How have you always worn your hair?

A Like this right here in them pictures; long.

Q Have you ever worn a flat-top or a crew cut hair cut?

A No, sir, I haven't.

[94] Q How long have you been working where you're working now?

A Little over a year.

Q And what do you do?

A Carpenter work.

Q And who is that for?

A Hugh Tallent.

Q Hugh Tallent? Is he here today?

A Yes, sir.

Q All right. I'll ask you, Eddie, when you first found out that they were looking for you on this charge,

this charge that we're here today on, about when it was?

A I guess not long after it happened. See, they went to my brother's house and then when he called down at the house, see, said they was looking for me, and told me, said they was looking for me, see. On account of my mother's car I reckon, on account of thinking that I had something to do with it.

Q All right. What did you do?

A Well, I mean, I know who done it, I mean, I knowed they'd surely catch who done it, I mean, I just—I just hid from 'em.

Q All right. Were you—were they looking for you for anything else?

A No, sir.

[95] Q Later were they?

A No, sir.

Q At any time were they looking for you for any other charge?

A No, sir.

Q I'll ask you if—whether or not your photograph came out in the paper in connection with any case?

A Yes, sir, it come out, a bunch of stuff they had my brother accused with for robberies and murders, they had me accused with it. And the only way that they changed it was the FBI got some fingerprints—

MR. LANZO: (Interposing) I object to all this hearsay, Your Honor.

THE COURT: I'll sustain the objection to hearsay.

Q Now, Eddie, did your picture come out in the newspaper?

A Yes, sir.

Q In connection with what?

A With this robbery and—

MR. LANZO: (Interposing) Object to the hearsay

again, Your Honor, newspaper article.

THE COURT: Well if he—he can testify that it did—that there was a picture in connection with this particular case.

[96] Q And what about any other case?

A Well, they had me accused for two murders and two or three armed robberies, I don't remember—

Q (Interposing) Who was later tried for those?

A My brother.

Q And who else?

A Jessie Jones.

Q Is that the co-defendant that they've been referring to here today?

A Yes, sir.

Q Did you know Jessie Jones personally?

A No, sir, just through Melvin a little bit.

Q All right. I'll ask you if prior to May of 1970, that your brother was—or your brother was tried up in East Tennessee in Federal Court for bank robbery?

A Yes, sir, him and Jessie Jones was tried before—for a thing that happened before this happened. And then all this other stuff happened afterwards this happened, I mean.

Q All right. Now when you say all this other stuff, your brother and who—that's Melvin now?

A Yes, sir.

Q They were tried for what?

A For a bank robbery in some part of Tennessee.

Q Now did that bank robbery occur prior to or after this—

[97] A (Interposing) Before this—before the By-Ryt.

Q All right. And after the By-Ryt occurred I'll ask you if they were tried for any crime that occurred after

the By-Ryt together?

A Yes, sir, some armed robberies and them murders.

Q And murder. Where was that, do you remember?

A Idaho and Washington.

Q All right. At any time—I'll ask you, Mr. Cox, if your picture came out in connection with this murder in Idaho?

A Yes, sir, they had me accused with it until the FBI—

Q (Interposing) Who else was accused?

A With Jessie Jones.

Q All right. And you were cleared of that by the FBI?

A Yes, sir.

Q All right. Who did they try for that later?

A Melvin, my brother, and Jessie Jones.

Q Were they convicted?

A Yes, sir.

Q All right. When was the last time you had seen Melvin prior to this date this place was robbed, Eddie?

A The day that this place was supposed to have been robbed.

[98] Q That day?

A Yes, sir.

Q What kind of a vehicle were they in?

A He come down there with some boy and left and he got Mother's car.

Q Some boy, who was that boy, do you know?

A I don't know; I wasn't—I didn't even see the guy.

Q You didn't see him?

A No.

Q You don't know who it was. Whose car did he get?

A Mother's.

Q Your mother's car? What kind of a car was that?

A A '66 yellow Chevrolet Camaro, I mean, I forget the name of it, but that picture—

Q (Interposing) These pictures that have been introduced as—

A (Interposing) Chevelle.

Q (Continuing) State's Exhibit 1, 4 and 5, those represent what the car appeared at that time?

A Yes, sir.

Q And when did you next see that car, Eddie?

A Well, when my mother got it back.

Q I don't know whether I asked you this or not. Have you ever worn your hair in a flat-top?

[99] A No, sir.

Q Have you always had that dimple in your chin?

A Yes, sir.

Q All right. These photographs that were introduced by us earlier, Defense Exhibit No. 1, 2 and 3, do these accurately depict you, or are they accurate pictures of you at the time they were made?

A Yes, sir.

Q Have you ever worn your hair any differently than in these photographs or as it is now?

A No, sir.

Q Do you know anything about how the robbery happened, of your own knowledge?

A No, sir.

Q Have you ever robbed anybody?

A No, sir, I never robbed nobody.

Q I believe you told us on two occasions that you had broken in a place?

A Yes, sir.

Q Several years ago and then one about two or three years ago, is that correct?

A Yes, sir.

Q What did you do in respect to those? Did you try those cases, or did you plead guilty or what?

A Pled guilty to 'em.

[100] Q You pled guilty.

MR. SCHOOLFIELD TO MR. LANZO: Ask him.

CROSS-EXAMINATION

BY MR. LANZO:

Q Mr. Cox, you say you're twenty-seven years old?

A Yes, sir.

Q Mr. Schoolfield asked you the question, what trouble have you been in the past. You've mentioned some convictions but what trouble have you been in—

MR. SCHOOLFIELD: (Interposing) Just a moment, Your Honor, I want to interpose an objection to that.

THE COURT: On what—

MR. SCHOOLFIELD: (Interposing) On the grounds that he's undertaking—I'd like to have the jury excused, Your Honor.

THE COURT: Well, come up here a moment.

(Thereupon, a private conversation was had between the Court, defense attorney and Asst. Atty. Gen.)

Q All right, Mr. Cox, let me refresh your memory a little bit. You said back in 1964, that is the date that you had one burglary, that is not exactly true, is it, Mr. Cox? You had two burglaries on that date; you pled guilty to both of them, didn't you?

A Yes, sir.

Q And then back in March of 1970, you had another***

* * *

APPENDIX M & N

EXCERPTS FROM TRANSCRIPT OF TRIAL TESTIMONY OF DOROTHY COX,

* * *

[128] MR. SCHOOLFIELD: We have no further use for Detective Westbrook. I understand he wants to get away.

THE COURT: I don't know whether the State does or not. Do you?

MR. LANZO: We do not.

THE COURT: I believe he wants to go on vacation. So thank you, Mr. Westbrook.

(Witness Westbrooks excused)

THE COURT: Do you have any other witnesses?

MR. SCHOOLFIELD: Yes, Your Honor.

DOROTHY COX,

called as a witness at the instance of the defense, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHOOLFIELD:

Q Would you state your name, please?

A Dorothy Cox.

Q Where do you live, Mrs. Cox?

A Chickamauga, Georgia, Route 1.

Q Are you married?

A Yes, sir.

Q And your husband's name?

A Clyde.

Q Do you have any children?

A Yes, sir.

[129] Q How many?

A Six.

Q Mrs. Cox, are you any relation to Charles Edward, or Eddie?

A His mother.

Q All right. You any relation to Melvin?

A Yes, sir; mother.

Q What about Clydie?

A His mother, too.

Q All right. Mrs. Cox, do you own, or back in May of 1970, did you own a yellow Chevrolet automobile?

A Yes, sir.

Q What—was that your personal private car, or was it your family car or what?

A The family car.

Q All right. Do you recall the day that this robbery occurred?

A May the 11th.

Q All right. Where were you—how did you first find out about that there had been a robbery?

A My oldest son called me and told me they'd arrested my—the one next to him.

Q That's Clydie?

A Clydie. Said they had arrested, "Did you know

[130] they arrested Clydie for armed robbery?" And I said, "No, but I don't know why they done that; they made a bad mistake somewhere," cause I said, "It's not him."

Q Don't tell—don't go into all the conversation. You found out about a robbery in that way, from a phone call?

A (Witness nods head, indicating yes.)

Q All right. Where was your car? Did you have

your car in your possession when you found this out?

A No. Melvin had been down to the house—

Q (Interposing) Now, Melvin, is that your other son, Melvin Cox?

A Yes, sir.

Q I'll show you a picture and ask you if you can identify that photograph?

(Thereupon, Defense Exhibit No. 4 was handed to the witness for examination.)

A That's Melvin.

Q That's who?

A Melvin.

Q Let the record show it's Defense Exhibit No. 4. That is Melvin Cox?

A Yes, sir.

Q That is your son. All right. You say he had been to your house?

A Yes, sir.

Q Was anybody with him, or do you remember?

[131] A No, when he come he come by hisself.

Q All right. What did he do?

A He stayed there awhile and he asked me to borrow my car, and said he wanted to go see Jessie, that other boy, said he needed to see him.

Q Do you know who Jessie was?

A Yeah, I knew him; yes, sir.

Q Jessie, what's his last name?

A Jones.

Q All right. Did you give him your car?

A Yes, I let him borrow it. I didn't know nothing like this was going to happen, but I let him borrow the car to go see Jessie; said he'd be right back.

MR. LANZO: (Interposing) Object to the hearsay, Your Honor.

Q Don't tell what he said—

THE COURT: (Interposing) I'll sustain the objection. Just answer the question.

Q Just answer my question, Mrs. Cox, and don't elaborate on it. Who did you let have your car?

A Melvin.

Q Melvin Cox?

A Yes, sir.

Q All right. You remember what time it was, or have any idea what time it was this happened?

[132] A Let's see, he'd been gone—he left about—it must have been about 3:30 or 4 o'clock.

Q What did—where was Eddie at this time, Charles Edward, this defendant here?

A At my house.

Q All right. Where did he live? Where did he reside?

A Chickamauga.

Q All right. Does he own a home there, or live in some house or what?

A Well, yes.

Q I'll ask you if that house is not next door?

A Yes.

Q All right. Was he there when Melvin left or not?

A He was there.

Q He was there. How long had he been there, do you know?

A He'd been there all day.

Q All day?

A Sure had.

Q Where was his wife, do you know?

A She was there.

Q All right. Does Eddie have a car?

A Yes.

Q His own private car?

[133] A Yes, sir.

Q All right. Do you know what kind of a car that is?

A Ford.

Q Ford? About what time was it that you found out that there had been some trouble involving a robbery and maybe one of your sons was involved?

A It was about five minutes before the news come on cause I just went right straight from the phone to the television, you know, and turned the television on.

Q All right. What did you do? Do you remember what you did?

A I was about to have fits really.

Q All right. Was Eddie there at that time, do you know?

A Yes, sir.

Q How long did he stay at your house after that, Mrs. Cox?

A Well, he stayed all night.

Q All right. When did he go to Kentucky?

A The next day I believe it was.

Q Do you remember how long it was afterwards or not?

A Well now I'm not sure cause I know that he, you know, we figured that they was going to start blaming him, and so we just—he said he knew they'd catch Melvin

[134] but he didn't—if they didn't find him then maybe they'd just take longer to question Melvin, you know.

Q All right. Now, Mrs. Cox, prior to this incident in May, I'll ask you if your other son, Melvin, and this Jessie Jones—well, let me rephrase it. I'll ask you if they have ever been tried in Federal Court up in Greeneville, Tennessee for a robbery that occurred prior to May

of 1970?

A Yes, sir.

Q All right, sir. Subsequent to that—subsequent to this robbery I'll ask you if they were tried for a robbery and murder in Lewiston, Idaho?

A Yes, sir.

Q Who were those people that were tried for that?

A Jessie Jones and Melvin Cox.

Q All right. Were they convicted?

A Yes, sir, but when they first come out with—when they first accused him of it why it was him they accused because all the witnesses in Lewiston, Idaho identified—

MR. LANZO: (Interposing) I object to the hearsay.

Q Well, don't tell that, Mrs. Cox—

THE COURT: (Interposing) Sustain the objection.

Q Don't tell that; that's hearsay. I'll ask you whether or not Eddie's picture came out in connection with this matter in Lewiston, Idaho?

[135] A Sure did.

Q Eddie and who?

A And Jessie Jones, but it was all on the news and everything, I mean, it—

Q (Interposing) Well, who were they looking for?

A Jessie Jones and Charles Edward Cox.

Q All right. Was he later cleared of it by anyone?

A Yes, sir; the FBI cleared him.

Q All right. And who was subsequently tried for that offense out there?

A Melvin.

Q All right. And that was after this incident in May of '70?

A Yes, sir.

Q Now was Eddie anywhere near the By-Ryt Supermarket on the afternoon of May the 11th, 1970?

A No, sir, he couldn't have been.

Q All right. I'll ask you if—when you got your car back, when they seized it out there at your son's house? Do you remember when it was?

A Yes, sir.

Q When was it?

A That afternoon.

Q That evening, afternoon?

A Yes, sir.

* * *

APPENDIX O

EXCERPTS FROM TRANSCRIPT OF TRIAL TESTIMONY OF CLYDE COX

* * *

[153] *** thing?

THE COURT: No—

MR. SCHOOLFIELD: (Interposing) No.

WITNESS: I couldn't show this letter?

THE COURT: You cannot. Now step down and you can talk to Mr. Schoolfield.

CLYDE PHILLIP COX, JR.,

called as a witness at the instance of the defense, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHOOLFIELD:

Q State your name for the Court and jury, please?

A Clyde Phillip Cox, Jr.

Q Where do you live, Clyde?

A Chickamauga, Georgia.

Q Back in May of 1970—oh, let me ask you, are you married?

A Yes, sir.

Q How old are you, Clyde?

A Be twenty-nine in February.

Q All right. Tell me your brothers' names?

A Charles Edward Cox, Marvin Cox, Melvin Cox, and Frank Cox.

Q All right. Now specifically I want to draw your attention to Melvin and Charles Edward. What do
[154] you call this defendant, Charles Edward? What does most of the family call him?

A Eddie.

Q Eddie? All right. Where did you live back in May of 1970, Clyde?

A Wentworth Street in East Ridge.

Q Where did you work?

A (Unintelligible) Brothers, I guess.

Q What?

A (Unintelligible) Brothers, I guess.

Q What's your trade?

A Carpenter work. I work, you know, off, you know, switch around jobs. Run out of work and you have to get another one.

Q Speak up now so—

A (Interposing) I say you run out of work you have to find another one.

Q All right. You're a construction carpenter?

A Yes, sir.

Q How long have you been a carpenter, Clyde?

A Three years.

Q What did you do prior to that?

A Labor.

Q All right. You married?

A Yes, sir.

[155] Q Do you have a family?

A Yes, sir.

Q When is the first time that you knew there was a problem out there as far as you were personally concerned?

A Whatever that date was, I guess.

Q Well, when this happened, what happened — just tell the Court and jury what happened, where you were and —

A (Interposing) I was setting there, got a little — had a little patio like.

Q Out by your house?

A Yes, sir, by the house there. And that car pulled up in there, you know, it was Melvin, my brother, and then they run through the yard there —

Q (Interposing) Melvin, your brother? Who else was there?

A I don't know that other boy, you know, he run around other side of the house.

Q All right. There was another boy there?

A Yes, sir, it was.

Q How many was there in the car?

A Just two.

Q Just two. All right. And where was Melvin?

A I don't know, you know, for sure which one.

Q Sir?

A He just come, you know, run by the patio

[156] thing there.

Q Was he walking or running?

A Running then.

Q All right. He was running. Did Melvin know where you lived?

A Yeah, he knew where I lived.

Q All right. Where did he go?

A I don't know.

Q Was your wife and family there at the house with you?

A Yes, sir.

Q You have any children?

A I got a little girl.

Q All right. What happened then?

A They arrested me; put me in jail.

Q Put you in jail? What did they charge you with?

A Them police was right behind 'em, you know, they just run up there and grabbed me, you know, and just put me, you know, just run to the patio, and just charged me with armed robbery.

Q All right. Then what happened?

A That's all I remember; I went to jail.

Q You went to jail? How long did you stay in jail?

A I got out that night.

[157] Q About what time?

A I don't really remember, you know.

Q All right. Were you put in a line-up or anything?

A Yes, sir, put me in a line-up.

Q All right. Then after that you were released?

A Yes, sir.

Q Of course, you've known Eddie, I guess, all of his life, haven't you, you being older?

A Yeah.

Q Has Eddie ever worn his hair in a flat-top?

A No, sir.

Q How has he always worn his hair since he's been

sixteen or seventeen years old?

A Just like it is now.

Q Just like it is now? What about Melvin? How has he always worn his hair since he was—

A (Interposing) It's short; got short hair.

Q All right. Is it burr, flat-top, or how would you describe it?

A Crew cut.

Q Let me show you a photograph here. Do you recognize that photograph that's been identified as Defense Exhibit No. 4?

(Thereupon, Defense Exhibit No. 4 was handed to the witness for examination.)

A Yes, sir.

[158] Q What is it? Who is it a picture of?

A Picture of my brother.

Q Which brother?

A Melvin.

Q Melvin? Does that depict the hair as he's always worn it, to your knowledge?

A Yes, sir.

Q Was Eddie there at your house on that evening, Clydie?

A No, sir.

Q All right. Did the police officers search your house?

A Yes, sir.

Q Throughout?

A Yes, sir, on top of it and everywhere.

Q All right. What did they do about your mother's car?

A I really didn't notice cause—

Q (Interposing) You were already hauled off?

A They took me to jail.

Q That's all.

CROSS-EXAMINATION

BY MR. LANZO:

Q Clyde, is it Clyde Cox?

* * *

APPENDIX P

[fol. 1] [Caption Omitted]

MOTION FOR A NEW TRIAL

(Filed December 21, 1971)

Comes now the defendant, CHARLES EDWARD COX, and moves the Court for a new trial for the following reasons:

1. That there is no evidence to support the verdict.

2. That the greater weight or preponderance of evidence is contrary to the verdict of the jury.

3. That the Court erred in refusing the Motion to Continue, in order to take the deposition of Melvin Luther Cox.

For these and other good and sufficient reasons to be shown on the trial of this cause, the defendant prays for a new trial.

SCHOOLFIELD & TAYLOR
/s/ Carter Schoolfield
Attorneys for Defendant

[Certificate of Service Omitted]

APPENDIX Q

ORDER OVERRULING MOTION FOR NEW TRIAL IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE — DIVISION I

January 24, 1972

Court met pursuant to adjournment, present and presiding the Honorable Campbell Carden, Judge, etc., when the following proceedings were had, to-wit:

****

119344 State v. Charles Edward Cox = Armed Robbery

This cause came on for hearing on a Motion For New Trial heretofore filed by Mr. Carter Schoolfield, and the Court, after hearing said motion and arguments of counsel, is of the opinion that said motion is not well taken, and it is, therefore, overruled. To which action of the Court in overruling said motion, the defendant then and there excepted and prayed an appeal to the next term of the Court of Criminal Appeals when sitting at Knoxville, Tennessee, which is granted and the defendant is allowed 90 days within which to prepare, have signed and file his Bill of Exceptions.

It is further ordered that the defendant be allowed to remain at liberty on the same bond pending said appeal.

* * * * * * * * * *

Thereupon, Court adjourned pending further business of the Court.

/s/ Campbell Carden
Judge

APPENDIX R

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

[fol. 1]

CHARLES EDWARD COX
Plaintiff-in-Error

vs.

STATE OF TENNESSEE
Defendant-in-Error

ORDER

Upon motion of the plaintiff-in-error, Charles Edward Cox, he is hereby granted a stay of execution of the judgment of this Court rendered on November 27, 1972 for a period of ninety days from February 5, 1973 pending the filing and disposition of a petition for the writ of certiorari in the Supreme Court of the United States, his petition for the writ of certiorari to the Supreme Court of Tennessee having been denied on February 5, 1973 during which time he may remain at liberty upon his appearance bond in the amount of Ten Thousand ($10,000.00) Dollars to the Supreme Court of Tennessee executed on December 9, 1972, his sureties thereon expressly consenting to remain bound thereby by approval of this Order.

A copy of the petition for certiorari, certified by plaintiff-in-error's counsel and showing the date of its filing in the United States Supreme Court, will be filed promptly with the Clerk of this Court.

At the conclusion of such ninety day period, however, if the plaintiff-in-error has failed to perfect his petition for the writ of certiorari in the United States Supreme Court, the Clerk will notify the Sheriff and the sureties for the plaintiff-in-error that the judgment heretofore entered by this Court will be executed forthwith.

[fol. 2] The Clerk of this Court will issue a duly certified copy of this Order to the Clerk of the Criminal Court of Hamilton County and the Sheriff of Hamilton County, and the Warden of the State Penitentiary at Nashville, Tennessee.

Enter this 1st day of March, 1973.

/s/
JUDGE

APPROVED:

/s/ Charles Cox
Plaintiff-in-Error

/s/ Mrs. Clyde Cox
Surety

/s/ Clyde Cox
Surety

JERRY H. SUMMERS and
CARTER SCHOOLFIELD

By: /s/ Jerry H. Summers & Carter Schoolfield
Attorneys for Plaintiff-in-Error

FILE COPY

FILED
JUN 1 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-1481

CHARLES EDWARD COX,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

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Nashville, Tennessee 37219
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DAVID M. PACK
ATTORNEY GENERAL

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-1481

CHARLES EDWARD COX,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

OPINION BELOW

The unreported opinion of the Court of Criminal Appeals of Tennessee was entered and filed on 28 November 1972. The Supreme Court of Tennessee denied a petition for certiorari in this case in an order filed 5 February 1973. Both the decision of the Court of Criminal Appeals and the order of the Supreme Court are appended to the petition for certiorari filed on behalf of Charles Edward Cox, petitioner.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

The respondent is not dissatisfied with the presentation of the question by the petitioner, except to note that the issue being raised does not present a federal question of substance.

STATEMENT OF THE CASE

The petitioner, Charles Edward Cox, was convicted on 2 December 1971 in the Criminal Court of Hamilton County, Tennessee of armed robbery and sentenced by the jury to confinement for a period of not more than ten years. The trial judge entered the judgment in accordance with the jury's verdict and announced a sentence of ten years in the state penitentiary. Upon the overruling of petitioner's motion for a new trial, the petitioner prayed for, was granted, and duly perfected an appeal-in-error to the Court of Criminal Appeals of Tennessee. The Court of Criminal Appeals in an unreported opinion filed 28 November 1972 affirmed the judgment of the trial court. On 5 February 1973 the Supreme Court of Tennessee denied a petition for writ of certiorari filed by the petitioner.

ARGUMENT

The respondent contends that the trial court incorrectly denied the motion of the petitioner for a continuance. The motion was based on the allegation that the petitioner's brother, Melvin Luther Cox, was the culprit in the robbery—not the defendant.

As set forth in the statement of facts in the petition and as noted in the opinion of the Court of Criminal Appeals (Appendix A to the petition), the petitioner made an eleventh hour request for a continuance in order to depose brother Melvin who was incarcerated in the federal penitentiary at Leavenworth, Kansas. An affidavit in support of the motion for continuance was filed by petitioner's trial defense

counsel to the effect that Brother Melvin would testify that he committed the offense in question—not the petitioner (Appendix E to the petition). The trial court reviewed the history of the case and determined that he would not grant this late motion.

The Court of Criminal Appeals upheld the trial court's determination upon the motion and determined that nothing was developed in the trial of the case to show that the trial court had abused his discretion in refusing to grant the motion for a continuance. Citing ***State ex rel. Carroll v. Henderson***, 1 Tenn. Crim. App. 427, 443 S.W.2d 689 (1969); ***Oden v. State***, 2 Tenn. Crim. App. 304, 453 S.W.2d 441 (1970); ***Morehead v. State***, 219 Tenn. 271 409 S.W.2d 357 (1966). The Court of Criminal Appeals further explained that when a party assigns error concerning the failure of a trial court to grant a continuance, he bears the burden of showing that the failure to continue the case was prejudicial. The entire record will be reviewed to determine whether or not the motion was properly denied. The ruling will only be reversed if it is shown that the party did not receive a fair trial and that a different result would have been reached had the continuance been granted.

As the Court of Criminal Appeals noted, there is nothing in the record, save the pleadings, that would indicate that brother Melvin would come into court and testify or state via deposition that he was the guilty party. Subsequent to the trial the petitioner filed a timely motion for new trial alleging, ***inter alia***, that the trial court erred in denying the petitioner's motion to continue the case for purposes of taking the deposition of his brother. The motion was heard and denied by the trial judge on 24 January 1972. (Appendices P, Q to the petition). From 28 September 1971

until 24 January 1972 was certainly sufficient time for the trial defense to have procured an affidavit from brother Melvin in support of his allegation that the trial court erred in refusing to grant the motion for a continuance. Tennessee practice allows the submission of affidavits in support of motions for new trial. It is obvious that if the petitioner's brother were willing to testify as asserted in the defense counsel's motion for new trial, such an affidavit could have been procured by the time of the hearing on the motion for new trial and in order to assert the trial court's error in refusing to grant a continuance such an affidavit should have been submitted.

The respondent does not disagree with the petitioner's propositions of law concerning his right to present evidence in his own behalf. However, this case is in no way similar to that of ***Brady v. Maryland***,, 373 U.S. 83 (1963). In ***Brady*** it appeared that the prosecution had suppressed evidence exculpatory to the defendant. In the instant case, there is no such evidence—only the naked allegation that such evidence might exist; if such evidence did exist, it was not within the control of the prosecution.

As petitioner has pointed out, Tennessee Code Annotated, §40-2428 allows a defendant in a criminal case the right to take a deposition as in a civil case. As noted such deposition may be taken by order of the court after notice to the district attorney. Until the day preceding the date of the trial no such request for the taking of a deposition was made. Therefore, it is readily apparent that the motion for a continuance based upon the alleged existence of an exculpatory witness was a dilatory tactic only.

Since there is no evidence in the record which would show that the motion for a continuance was other than a mere dilatory tactic, the respondent submits that the proper

forum for a determination of whether or not such evidence actually existed and whether or not the trial court thus erred in denying the continuance would be at an evidentiary hearing in a federal district court upon a petition for a writ of habeas corpus.

CONCLUSION

As the petition presents no question which merits this Honorable Court's review on a writ of certiorari, respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ALEX B. SHIPLEY, JR.
Assistant Attorney General
420 Supreme Court Building
Nashville, Tennessee 37219
(615) 741-2865

Attorney for Respondent